

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

8 The UNITED STATES of America)
9 for the Use and Benefit of) NO. CV-05-0068-LRS
Graybar Electric Company,)
10 Inc., a New York Corporation,) ORDER DENYING DEFENDANT
and GRAYBAR ELECTRIC COMPANY,) ATLANTIC MUTUAL INSURANCE
11 INC., Individually,) COMPANY'S MOTION FOR
Plaintiffs,) SUMMARY JUDGMENT
12)
13 -vs-)
14 OVERSTREET ELECTRIC CO., INC.,)
15 a Florida Corporation and)
ATLANTIC MUTUAL INSURANCE)
COMPANY, a New York)
16 Corporation,)
Defendants.)
17)

18 Before the Court is Defendant Atlantic Mutual Insurance
19 Company's [Atlantic] Motion for Summary Judgment (Ct. Rec. 43-1),
20 filed August 29, 2005. A hearing was held on September 29, 2005
21 in Yakima, Washington. Henry Hamilton appeared on behalf of
22 Defendant Atlantic. Carl Kirsch appeared telephonically and C.
23 Richard McQueen appeared in person on behalf Plaintiff Graybar
24 Electric Company [Graybar]. James Yand appeared for Defendant
25 Overstreet Electric Company [Overstreet].

26 Defendant Atlantic asserts Plaintiff's claim under the Miller
27 Act is time-barred pursuant to 40 U.S.C. §3133(b)(4) because
28 Plaintiff's March 18, 2005 delivery of Operations and Maintenance

1 manuals [O&M manuals] constituted a delivery of materials that was
 2 merely corrective in nature.

3 Plaintiff, in its opposition, argued that the delivery of O&M
 4 manuals on March 18, 2005 constituted a delivery of Miller Act
 5 materials that triggered the running of the Act's one-year statute
 6 of limitations. Plaintiff's complaint was filed on March 4, 2005.

7 The Court found at the hearing that genuine issues of material
 8 fact existed as to the ultimate determination of the date upon
 9 which the last materials were delivered by Plaintiff pursuant to
 10 the original purchase order contract¹ requiring specific materials
 11 to be supplied by Plaintiff. Whether the March 18, 2005 delivery
 12 of O&M manuals was corrective in nature and whether the action was
 13 timely commenced, are issues of fact that can only be resolved at
 14 trial.²

15 The Court considered the undisputed fact that Plaintiff was
 16 informed by fax directive on March 21, 2005 from Defendant
 17 Overstreet's project manager that "all new sets" were required by
 18 the U.S. Army Corps of Engineers [Corps] and that "the Corps won't
 19 accept updates." The Court further considered the undisputed
 20

21 ¹On July 16, 2002, Defendant Overstreet and Plaintiff Graybar
 22 entered into an agreement titled Purchase Order No. 402-241860
 23 [P.O.] for the provision of certain materials and equipment for
 24 installation of a station service transformer for the Chief Joseph
 25 Dam for United States contract No. DACW67-020C-0012 [Government
 26 Contract]. The P.O. was for the sum of \$370,800. Specification
 27 Section 01701 of the Government Contract was the provision
 28 requiring the provision of O&M manuals submitted by Overstreet to
 the Corps.

29 ²As an aside, the Court notes that at least one circuit, the
 30 Fifth Circuit, has not expressly adopted the general rule which
 31 provides that remedial or corrective work does not extend the one-
 32 year limitations period. See *United States of America for the
 33 Use and Benefit of T.L. Wallace Construction, Inc. v. Fireman's
 Fund Ins. Co.*, 790 F.Supp. 680,684 (S.D. Miss. 1992).

1 evidence that indicated Plaintiff was never relieved of its
2 contractual performance obligations to Defendant Overstreet,
3 including provision of the O&M manuals for the Trench air core dry
4 reactor Plaintiff Graybar supplied to Overstreet.³

5 The Court having considered the oral and written argument of
6 counsel, enters this Order to supplement and memorialize the oral
7 rulings of the Court. Accordingly,

8 **IT IS ORDERED** that:

9 1. Defendant Atlantic's Motion for Summary Judgment, Ct. Rec.
10 43-1, filed August 29, 2005 is **DENIED**.

11 2. Plaintiff's *Sua Sponte* Motion for Summary Judgment, raised
12 in its opposition briefing, is **DENIED** based on the court's ruling
13 above.

14 The District Court Executive is directed to file this Order and
15 provide copies to counsel.

16 **DATED** this 3rd day of October, 2005

17 *s/Lonny R. Suko*
18

19 LONNY R. SUKO
20 UNITED STATES DISTRICT JUDGE
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28 ³The court notes that the Trench core dry reactor is
currently in the Corps' possession and Plaintiff is presently owed
\$313,036.37 for supplying the reactor to Overstreet on credit.